



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

CIVIL CASE NO. 143 OF 2004

ZAINUL GALIB VELJI.....PLAINTIFF

VERSUS

ERI LIMITED.....DEFENDANT

RULING

On the 1st day of August 2011, this court delivered a Ruling whose central effect was to strike out the defence and counter claim. The counsel for the successful plaintiff has informed the court that he prepared a preliminary decree for approval of the same by the defence. containing the following items:-

- 1. The plaintiff shall have vacant possession of the suit property described as L. R. NO. KISUMU MUNICIPALITY BLOCK 3/92 forthwith.**
- 2. The defendant shall pay the plaintiff general damages for trespass to the suit property L. R. No. KISUMU MUNICIPALITY BLOCK 3/92 and mesne profits in respect of its occupation of the said property from January 2004 to the date of Judgment**
- 3. The determination of the reliefs in clause 2 foregoing do proceed to formal proof**
- 4. The plaintiff shall have the costs of this suit and of the counter claim together with interest there on at court rates.**

The court was informed that the defence rejected the preliminary decree because they objected to vacation being effected forthwith and also the Ruling was silent on the issue of costs on the suit and the struck out defence and counter claim. This necessitated the plaintiff counsel to refer the matter to this court vide a letter dated 7th day of September 2011 vide Order 21 Rule 8 (4) Civil Procedure Act for the

courts approval of the terms of the decree. The said letter had been responded to by the defence vide their letter dated 27th day of September 2011

Both parties appeared in court on the 28th day of September 2011 for the settlement of the terms of the decree. The following was agreed on mutually with regard to items 1,2, and 3.

(1) The plaintiff shall have vacant possession of the suit property in LR No. Kisumu Municipality Block 3/92.

(2) The defendant shall pay the plaintiff general damages for trespass to the suit property LR No. Kisumu Municipality Block 3/92 and mesne profit in respect of its occupation of the said property from 1st January 2006 to the date of judgment.

(3) The determination of the reliefs in clause 2 afore going do proceed to formal proof.

Item 4 was not agreed upon by consent because it was alleged that the ruling is silent on the same. A revisit to the ruling reveals that vide item 3 and 4 of the ruling dated 15th day of August 2011 it is revealed that a prayer 1 and 2 of the said application which sought the striking out of the defendants defence as per prayer 1 and the defendants defence and counter claim as per prayer 2 in the alternative were allowed. It is agreed by both sides that issue of costs on the struck out pleadings was not made provision for and that is why the defence resisted their being included in the preliminary decree.

The law on costs has been settled and crystallized both by provision of the Civil Procedure Act, as well as case law on the subject that this court has judicial notice of both emanating from the court of appeal and as dutifully followed by the superior court and subordinate courts section 27 of the CPA reads:-

“section 27 (1) subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, costs of and incidental to all suits shall be in the discretion of the court or judge and the court or judge shall have full power to determine by whom and out of what property or to what extent such costs are to be paid and to give its necessary directions for the purposes there to and the fact that the court or judge had no jurisdiction to try the suit shall be no bar to the exercise of these powers provided that the costs of any action cause or other matter or issue shall follow the event unless the court or judge shall for good reasons otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen percent per annum and such interest shall be added to the costs and shall be receivable as such”.

This court's construction of this provision in the light of the case law constructs the same that this court has judicial notice of is that the act of granting or withholding costs is discretionary and like the exercise of all judicial discretions that this court has judicial notice of, the said discretion has to be exercised Judiciously and not capriciously but with a reason.

In relation to an award of costs, the usual practice is that these usually follow the event and where a successful litigant is to be denied costs, good cause has to be shown. Herein the successful party is the plaintiff. Costs should have followed the event. Failure of the court to award the same amounts to nothing but an inadvertent error on the part of the court which if corrected will not alter the nature of the

relief given. The plaintiff was therefore entitled to revisit the issue and have it properly anchored as a relief.

In the circumstances of this case, there is no reason as to why the costs could have been withheld from the plaintiff. None has been suggested by the defence. The court therefore moves upon invitation to rectify the error and settle the terms of the decree in this area by adding item 8 to the ruling of 1-8-2011 to the effect that : **“(8) The plaintiff will have costs of the struck out defence and counter claim”**. It matters not that the same may not have been prayed for. The law in section 27 CPA does not say these must have been prayed for. The overriding primary consideration is that these should have been demonstrated that these had been incurred by the successful party. Demonstration herein exists because the plaintiff came to court first, the defendants moved to defend and have defended up to the striking out point. Being successful, it means the plaintiff had a genuine complaint against the defendant as found by the court in the ruling of 1-8-2011, she is entitled to costs and it is so ordered.

As for interest on costs this will also follow the events. The court notes that issues of interest on costs usually arises only after the taxation and when it so arises it will be dealt with in accordance with the relevant rules.

It is so ordered.

Dated, delivered and signed at Kisumu this 29th day of September 2011.

ROSELYN N. NAMBUYE

JUDGE

RNN/aao